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Supreme Court of the United States

OCTOBER TERM, 1969

THE UNITED STATES OF AMERICA,
Petitioner,

v.

THE DISTRICT COURT IN AND FOR THE COUNTY OF EAGLE AND STATE OF COLORADO and the Judge Thereof, THE HONORABLE HAROLD A. GRANT,
Respondents,

THE COLORADO RIVER WATER CONSERVATION DISTRICT, CITY AND COUNTY OF DENVER, Acting by and Through Its Board of Water Commissioners, CENTRAL COLORADO WATER CONSERVANCY DISTRICT, and THE NEW JERSEY ZINC COMPANY,
Intervenors.

BRIEF FOR RESPONDENT DISTRICT COURT AND FOR THE COLORADO RIVER WATER CONSERVATION DISTRICT IN SUPPORT OF CERTIORARI

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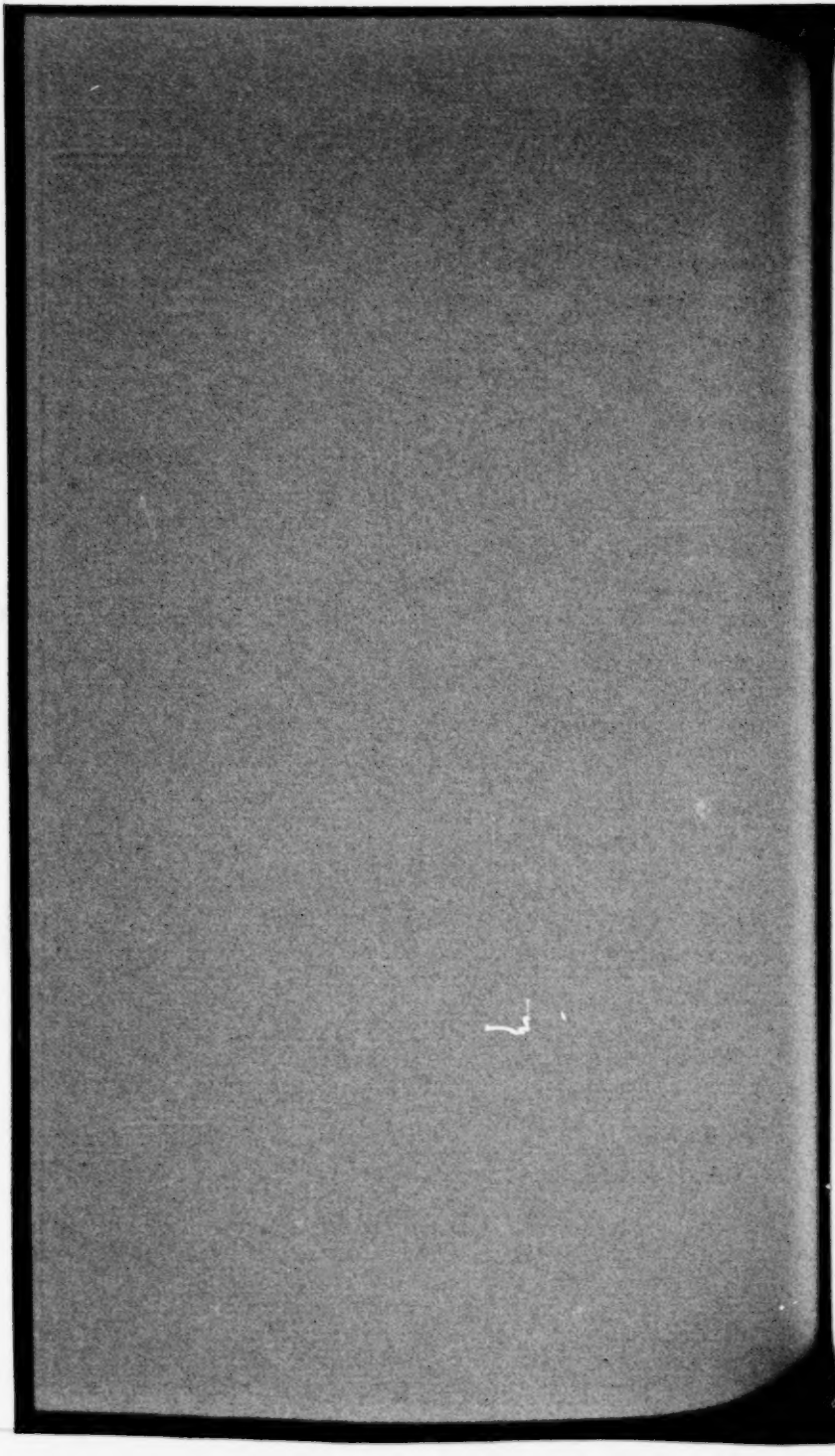

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No. 1178

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The respondent court and the Colorado River Water Conservation District support the request of the United States that the writ of certiorari be granted because of the importance of determining now the question of state court jurisdiction under 43 U.S.C. §666. However, we differ from the Government in its view that the court below erred, and believe that consideration of the question of whether to grant the writ can be facilitated through the presentation of the questions, the facts and the arguments as set forth herein.

QUESTIONS PRESENTED

1. Whether under 43 U.S.C. § 666 a state court in adjudicating water rights under state law can obtain jurisdiction over the United States.

2. Under joinder of the U.S. pursuant to 43 U.S.C. § 666, must the United States set forth with particularity all of its claims to water for adjudication by such state court with those of other claimants.

STATUTE INVOLVED

In addition to 43 U.S.C. § 666(a) which is set forth in full in the Government's Petition (at 2), we think § 666(b) and (c) material, as follows:

> (b) Summons or other process in any such suit shall be served upon the Attorney General or his designated representative.
>
> (c) Nothing in this section shall be construed as authorizing the joinder of the United States in any suit or controversy in the Supreme Court of the United States involving the right of States to the use of the water of any interstate stream.

STATEMENT

The interest of the District. The Colorado River Water Conservation District (District) is a public agency of the State comprising the area of all or part of 15 counties in western Colorado. It was established in 1937 for the purpose of conserving and developing the waters of the Colorado River and its tributaries within the State.[1] The Eagle River and its tributaries, a river system within District territory, joins the Colorado River at a point not far upstream from Glenwood Springs, Colorado, where the District maintains its headquarters. It is the Eagle River system which is the subject of this suit.

[1] Colo. Rev. Stat. §150-7-1 (1963).

Background of this case. The action which brings us to this Court started in October, 1967, when, upon application by the District, the District Court for Eagle County, Colorado issued a Notice of Application for Supplemental Adjudication of Water Rights[2] in what was then Water District No. 37,[3] covering the only river system therein, namely the Eagle River and its tributaries. The Attorney General of the United States was served with this Notice, pursuant to 43 U.S.C. § 666(b) (R.10).[4]

Upon being served, the United States moved that it be dismissed ". . . for lack of jurisdiction . . ." (R. 14), but nevertheless noted in a supporting memorandum that rights would be claimed to the use of water related to certain reservations of public lands (principally the White River National Forest), as well as rights to in excess of 220 specific uses. The Government's general description of these claims is set forth in full in the opinion of the court below. (Pet. App. 33-34; see also R.26-27).

The respondent court denied the Government's motion to dismiss on August 20, 1968 and set October 21, 1968 as the date for filing statements of claim and October 28, 1968 as the date for taking evidence (R. 5,6).

Thereupon, the United States applied to the Supreme Court of Colorado for a writ in the nature of prohibition

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[2]As provided for in Colo. Rev. Stat. 148-9-7 (1963); Repealed, Session Laws, Colo. (1969) C. 373, §20.

[3]In 1969, the Colorado Legislature passed the Water Rights Determination and Administration Act of 1969, codified as Colo. Rev. Stat. 148-21-1 et seq. (1963), referred to in the Government's Petition at 18, fn. 15. The 1969 Act replaced the 70 existing Water Districts with 7 Divisions. The Colorado River and its tributaries within Colorado, exclusive of the Gunnison, are now in Division 5.

[4]The requirements of Fed. R. Civ. P. 4(d) (4) were also observed.

directed to the respondent district court, asking that that court be prohibited from asserting jurisdiction over or adjudicating any water rights of the Government (R. 1). In seeking this writ the United States advised the court below (R. 7):

> It should be pointed out, of course, that if this Court were to find that this Application [for prohibition] and its supporting brief misstate Colorado law and were to hold that the United States could adjudicate all of its rights in proceedings such as this and obtain the true priority date of its reserved and appropriative rights, most of the objections of the United States to these adjudications would be removed. While the United States could not, even then, be joined as a defendant under 43 U.S.C. sec. 666, for the reason that an entire river system would not be involved, the United States would be assured it could have its rights properly adjudicated if it chose to appear as plaintiff in a Colorado Water District adjudication. While no representation can be made at this time as to what the United States would do in any particular case, it can be represented that the Department of Justice would raise no general objection to appearances as plaintiff in appropriate cases under the supposed circumstances.

The Supreme Court of Colorado issued a rule to show cause as to why the writ should not be issued (R. 92) and considered the cause upon briefs and oral argument. On September 15, 1969 the court below discharged the rule (R. 202), and rendered its opinion (Pet. App. A; R. 171). The opinion held that 43 U.S.C. §666 gave jurisdiction to the respondent district court (Pet. App. 45); that that court could consider all of the claims of the United States from whatever source derived (Pet. App. 46); that that court had the authority to bring before it all necessary parties whose rights might be affected as a consequence of the adjudication of the rights of the United States (Pet. App. 47); and that inasmuch as the United States had not made

specific claims in terms of quantities of water as to reserved rights it was premature to rule thereon as to priority dates or quantities (Pet. App. 40).

While these holdings appear to satisfy most if not all of the above-quoted considerations advanced in the Government's application for prohibition, the United States nevertheless did not file claims in the respondent court but instead brought its petition here for a writ of certiorari, in effect seeking the prohibition denied it by the court below.

ARGUMENT

The issue for the Court in this case is whether the respondent court properly assumed jurisdiction of the United States.

We concur in the Government's view that the only statute by which the United States has given its consent to be made a party in such adjudication proceedings is 43 U.S.C. §666 (Pet. 11). Because of its great importance to the orderly adjudication and administration of water rights, the reach of that consent should now be definitively construed by this Court.

It might be argued that decision in this controversy should be withheld until the United States has actually specified all of its claims, including those claimed as reserved rights, and the Colorado court has decided the amounts and the priority dates for each in the context of all of the other claims put forth. But the jurisdictional question would apparently remain at the threshold of any later effort in this Court. It should be decided now, before further precious time has been lost and considerable further expense has been entailed.

We argue below our view that almost two decades ago Congress recognized the necessity of subjecting *all* of the claims of the United States to adjudication in proceedings such as the District instituted here. Only the States have systems for the adjudication *and* administration of water

rights. Section 666 covers both facets of this important field and applies fully to the situation before us.

1. Section 666 Was Intended to Grant Jurisdiction Over the United States in Water Rights Litigation Such as Presented by This Case.

This case involves "a river system" within the contemplation of 43 U.S.C. §666. It is misleading to recite that Water District 37 is one of 70 such districts in Colorado and does not therefore embrace a "river system" (Pet. 17). Even before the 1969 Act there were only 11 such districts comprising the Colorado River and its tributaries. Colorado adjudication statutes have always considered the Colorado River as a whole in establishing priority for the right to use waters therefrom.[5]

In its application for a writ of prohibition the United States noted that it could not be joined under 43 U.S.C. §666 for the reason that an "entire river system" would not be involved (R. 3; p. 4, supra). It might be sufficient to observe that the statute does not use the word "entire"–the language is "the use of water of a river system or other source". Whatever this phrase means, it certainly does not require an entire river system.

Nor does *Dugan v. Rank*, 372 U.S. 609 (1963), suggest otherwise. There the Court was concerned that it be a *general* adjudication of the rights on a given stream (id. at 618). As long as all those whose rights stand to be affected are given notice–as the court below indicated the

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[5]Colo. Rev. Stat. 148-9-17 (1963) allowed anyone in the division, i.e. anyone using water from the Colorado River outside the district where adjudication was taking place, to participate therein, or by separate suit within four years after decree to challenge the in-district priority as it related to the river as a whole. *Holbrook Irrig. Dist. v. Arkansas Valley Sugar Beet & Irrig. Land Co., et al*, 54 F. 2d 840 (1931); *Fort Lyon Canal Co. v. Arkansas Valley Sugar Beet & Irrig. Land Co.*, 39 Colo. 332, 90 P. 1023 (1907). See also Pet. App. 31.

trial court would have the authority to require in this case (Pet. App. 47)–there would be a general adjudication (Pet. App. 29). And the Eagle River and its tributaries is not only "a river system" as the statute requires (and indeed the only river system and surface water source in what was Water District No. 37) but is furthermore a *given* stream or watercourse. This was precisely the term used by the Senate Committee on the Judiciary in reporting to the Senate on what was then S. 18 and what later became 43 U.S.C. §666, as follows:

> . . . it is essential that each and every owner along a given water course, including the United States, must be amenable to the law of the State . . .[6]

Indeed, in its memorandum supporting its application for prohibition the Government recognized that a "river system" is something less than the entire Colorado River in Colorado when it informed the court below:

> . . . while it may not be necessary to conclude that all users of the Colorado System in Colorado must be joined, we believe all users outside a Water District that would be substantially affected by diversions in a Water District are necessary parties to a proper general adjudication under 43 U.S.C. Sec. 666 . . . (R. 62).

Finally reduced, the Government's complaint here seems to be that the Congress in enacting §666 could not have intended that the United States be burdened with innumerable suits "as to only small portions of recognizable river systems" and "piecemeal adjudications" (Pet. 17-18). But quite apart from the fact that the Eagle and its tributaries comprise a clearly recognizable river system, in reporting unfavorably on what is now §666 some 19 years ago, the Justice Department complained in almost identical vein that waiver of immunity:

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[6]S. Rep. No. 755, 82d. Cong., 1st Sess. at 6 (1951).

> . . . would result in the piecemeal adjudication of water rights, in turn resulting in a multiplicity of actions . . .[7]

The Committee, however, found little difficulty in brushing aside this objection as follows:

> The Committee has taken note of the reports of the Department of Justice and the Department of the Interior printed below which oppose the legislation but has concluded, after a consideration of all of the evidence available to the committee, that the legislation is meritorious.[8]

2. If Proceedings for the Determination of Water Rights are to be Meaningful, the United States Must set Forth all of its Claims With Particularity.

The Senate Judiciary Committee, in reporting on what became §666 and after noting that it was essential that water users along a given stream, including the United States, had to be amenable to state administration of the stream, said:

> The committee is of the opinion that there is no valid reason why the United States should not be required to join in a proceeding when it is a necessary party and to be *required to abide* by the decisions of the Court in the same manner as if it were a private individual.[9]

The Senate Committee clearly apprehended that if any water user claiming a right by reason of Federal ownership could claim immunity from State proceedings, these claims could materially interfere with proper administration of a stream as well as beneficial uses of others. In the Commit-

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[7]Id. at 7.

[8]Id. at 2.

[9]Id. at.6, emphasis added.

tee's view it was necessary that state statutory water laws be applied to *all* claimants to the end that:

> . . . the public waters so necessary to the economic welfare of the arid States be allotted in as equitable manner as possible to all users . . .[10]

The Committee quoted[11] from the opinion of this Court in *Pacific Live Stock Co. v. Oregon Water Board*, 241 U.S. 440, 447-48 (1916) in summarizing the essential purposes of these state water laws:

> All claimants are required to appear and prove their claims . . . [The proceeding] is intended to be universal and to result in a complete ascertainment of all existing rights, to the end, first, that the waters may be distributed, under public supervision, among the lawful claimants according to their respective rights without needless waste or controversy; second, that the rights of all may be evidenced by appropriate certificates and public records, always readily accessible . . .; and, third, that the amount of surplus or unclaimed water, if any, may be ascertained and rendered available to intending appropriators.

These high purposes can only be attained if the United States appears pursuant to 43 U.S.C. §666 in the Colorado proceedings and quantifies her claims of all descriptions. Otherwise any such proceedings will be rendered ineffectual.

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[10]Id. at 5.

[11]Id. at 5.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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